in conclusion the benefit of having the statute of limitations cease running against him while in prison.[9]

Having observed the status of the criminal in Roman law, at common law, and finally under California law, it will perhaps be not inappropriate to conclude with a brief suggestion as to what his status ought to be in the future. The tendency of modern juristic thought, as found in the criminal statutes of some of our progressive states, is away from the harshness and barbarism of the Roman and common law. Civil death seems today a somewhat impracticable and doubtful penalty. It is hard to apply and often inflicts a greater injury upon the innocent family or relatives of the felon or even upon the state itself, in tying up his property, than it does upon the convict. And finally, it is not in accord with the modern notion that imprisonment of the felon is rather a means for protecting society, than a punishment imposed upon the individual. A statute similar to that in New York or Kansas, providing for the appointment of a trustee to administer the felon's affairs would as a practical matter accomplish all that is desired, and at the same time might well meet with the approval of many who would be unwilling to see the rules relating to civil death completely abrogated.[10]

H. A. J.

VENDOR AND PURCHASER: NATURE AND WAIVER OF VENDOR'S LIEN.—In *Braun v. Kahn*[1] the vendor sued on a note given for the balance of the purchase price of real estate and obtained a money judgment. He caused an issuance and levy of execution thereon. Later he abandoned his execution lien and commenced an action on the judgment recovered on the note. In this action he claimed a vendor's lien and asked to have the property sold to satisfy this lien. The court, overruling dicta in early California cases,[2] allowed the recovery. The defendant appealed alleging that the plaintiff had waived his vendor's lien by bringing a personal action and obtaining a personal judgment on the note followed by execution thereon. The lien of an unpaid seller of real estate, although suggested by the Roman law covering the sale of personal property, is a creation of the English Courts of Chancery.[3] Many states, including California, following the English cases, hold that the lien exists irrespective of express reservation.[4] "Upon principle,"

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[9] Cal. Pen. Code, §§ 676, 675; Cal. Code Civ. Proc., § 328.

[10] New v. Smith (1906), 73 Kan. 174, 84 Pac. 1030; Kansas Gen. Stat. 1901, §§ 2301, 5776, 5780, 5781; Bowles v. Haberman (1884), 95 N. Y. 247; 2 Revised Statutes of N. Y., § 15; N. Y. Pen. Code, § 707.

[1] (Aug. 18, 1916), 23 Cal. App. Dec. 263.

[2] Fitzell v. Leaky (1887), 72 Cal. 477, 14 Pac. 198; Longmaid v. Coulter (1898), 123 Cal. 208, 55 Pac. 791.

[3] Mackreth v. Symmons (1808), 15 Ves. 329, 33 Eng. Rep. Repr. 778. See also 2 Story, Equity, (13th ed.), p. 563.

[4] 2 Jones on Liens (2nd ed.), § 1063.

says Lord Eldon, "it goes on this, that a person having gotten the estate of another shall not as between them keep it and not pay the consideration."[5] The question as to what constitutes a waiver of the lien of the vendor of real estate has been the subject of much controversy. The courts are generally agreed that before a person can be said to have waived such a lien, he must have done something inconsistent with the exercise of said lien and evincing an intention to waive it.[6] The difficulty arises when we attempt to discover what constitutes an act inconsistent with the exercise of the lien which amounts to a waiver of it. The better cases agree that the bringing of a suit and obtaining of a judgment thereon do not of themselves constitute a waiver.[7] Suppose, as in the principal case, that the plaintiff goes one step further and levies execution. Does this amount to a waiver of the lien? The appellant's contention was that the vendor, having secured an execution lien on the property in question, had an interest inconsistent with the equitable lien. This apparently sound argument falls when we consider that the execution lien holder is not a bona fide purchaser who takes free from the lien of the vendor. The very nature of the lien in question is based on the theory that a person cannot keep the estate of another until he has paid the full purchase price. So, until the total price has been paid, or the property has been taken from the vendee by an execution sale or a sale has been made by the vendee to a bona fide purchaser, the reason for the lien is still present and the lien should continue to exist. Many cases hold that a sale of the property under execution amounts to a waiver of the lien irrespective of the amount realized thereon.[8] Where, however, there has been no sale of the property the prevailing rule is that the mere levying of an execution thereon does not amount to a waiver of the lien.[9] The decision of the court is sound in principle and is well supported by leading decisions in other jurisdictions.

S. F. H.

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[5] Mackreth v. Symmons (1808), 15 Ves. 329, 344, 33 Eng. Rep. Repr. 778, 783.

[6] Selna v. Selna (1899), 125 Cal. 357, 58 Pac. 16; 2 Jones on Liens (2nd ed.), § 1073.

[7] Graves v. Coutant (1879), 31 N. J. Eq. 763; Elswick v. Matney (1909), 132 Ky. 294, 116 S. W. 718.

[8] Yetter v. Fitts (1887), 113 Ind. 34, 14 N. E. 707; Borror v. Carrier (1905), 34 Ind. App. 353. See also notes in 50 L. R. A. 714, and 13 Ann. Cas. 92.

[9] Supra, n. 7.